2011 IL App (4th) 090563-U

Filed 9/30/11

NO. 4-09-0563

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS,<br>Plaintiff-Appellee,<br>v.<br>DONALD J. WHALEN,<br>Defendant-Appellant. | ) | Appeal from<br>Circuit Court of<br>McLean County<br>No. 91CF344<br><br>Honorable<br>Elizabeth A. Robb,<br>Judge Presiding. |

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justice Steigmann concurred in the judgment.
Justice McCullough dissented.

**ORDER**

¶ 1 *Held:* The trial court erred in denying defendant's posttrial motion under section 116-3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-3 (West 2008)) for deoxyribonucleic acid (DNA) testing as it related to knives found at the scene of defendant's father's murder. Although the knives, after initial testing at the time of trial, had been stored for 15 years in an open box with other evidence and it is possible they were contaminated with the DNA of a person unrelated to the commission of the crime, it is also possible a third person could be identified who committed the crime. A "mixed DNA sample" is accepted in the scientific community to reliably reveal the number of contributors to a DNA sample and major versus minor contributors. Further, testing may materially advance defendant's claim of innocence as defendant raised at trial, through an offer of proof, a specific named individual committed the murder and he was prevented from presenting testimony from an expert witness challenging the reliability of comparison evidence of defendant's palm print at the scene due to late disclosure of the expert.

Defendant's claims of the unconstitutionality of section 116-3 are without merit as he received a meaningful opportunity to present his claims.

¶ 2 In 1991, defendant Donald J. Whalen, was convicted of the first degree murder of his father, William Whalen, and sentenced to 60 years in prison. On direct appeal, this court affirmed his conviction and sentence. *People v. Whalen*, 238 Ill. App. 3d 994, 605 N.E.2d 604 (1992). The supreme court affirmed this court's decision. *People v. Whalen*, 158 Ill. 2d 415, 634 N.E.2d 725 (1994). Defendant appeals the trial court's partial denial of his motion for deoxyribonucleic acid (DNA) testing pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/116-3 (West 2008)). We affirm in part and reverse in part.

¶ 3 I. BACKGROUND

¶ 4 In the early morning hours of April 6, 1991, William Whalen's body was discovered lying on the floor of the tavern he owned and operated in Bloomington. He had been beaten and stabbed. A broken barstool, two broken pool cues, and several bent knives were found near the body. An autopsy showed William sustained 39 blunt trauma wounds and 33 stab and incised wounds.

¶ 5 A bloody palmprint on a piece of a broken pool cue linked defendant to the crime. The State's expert identified the palmprint as defendant's and the blood was found to be consistent with William's blood type. Defendant was found in possession of shoes consistent with bloody shoeprints found at the crime scene in both length and width. Distinctive lettering on the soles of defendant's shoes matched the bloody shoeprints. Defendant maintained his innocence of the crime. After a jury trial, he was convicted and sentenced.

¶ 6 On March 10, 2003, defendant filed a *pro se* motion for DNA testing pursuant to section 116-3 of the Code. On July 24, 2003, and November 19, 2004, with the assistance of counsel, he filed amended and second amended motions for DNA testing, respectively.

Defendant requested forensic analysis using STR-based PCR DNA testing and/or mitochondrial DNA testing on nine blood swabs from various areas of the crime scene, hair found in the victim's hands, hair found on a table near the body, blood on knives at the scene, and blood and hair samples from both defendant and the victim.

¶ 7 On February 16, 2005, the trial court conducted a hearing on defendant's second amended motion. During the hearing, the judge, the assistant State's Attorney, and defendant's counsel visited the McLean County Circuit Clerk's evidence vault to view the condition of the exhibits from defendant's jury trial. During that viewing, the assistant State's Attorney noted as follows:

> "For the record, at the bottom of the box, there appears to be several of the knives and parts of pool cue sticks that are just laying [*sic*] in the box. There is no coverage on them. They [a]re not sealed. They [a]re just laying [*sic*] altogether. These knives are something that the defense is requesting to be tested. They obviously are commingled with all of [the] other evidence in the bottom of the box."

¶ 8 The parties agreed to consult with forensic-testing experts regarding the storage conditions of the evidence to determine if testing could yield reliable results. At a March 14 2005, hearing, the parties reported their findings. The State contacted the Illinois State Police (ISP) Morton Forensic Laboratory and described the condition of the knives. Crime lab personnel informed the State the contamination factor on the knives was too high and reliable testing could not be provided on those items. Defendant's counsel contacted Independent

Forensics of Illinois and spoke with Dr. Karl Reich. Dr. Reich stated it would be difficult to determine whether testing on the knives would yield a reliable result unless he could examine the knives.

¶ 9 On April 12, 2005, the trial court authorized the payment of funds to allow defendant to secure an expert opinion to address issues related to evidence storage. On May 16, 2005, the parties and their experts met to further examine the storage condition of the knives. Dr. Reich appeared as defendant's expert. Also present, were ISP Morton Assistant Laboratory Director Cari Berry and ISP Morton Forensic Scientist Kevin Zeeb.

¶ 10 On June 6, 2005, a report authored by Berry and Zeeb was filed. Their report noted the knives were received by the ISP Morton Forensic Laboratory for analysis in 1991. Indicated bloodstains were removed from the knives and returned to the Bloomington police department. The knives were then "analyzed for latent prints using super glue fuming, black powder, ardrox, dye stain, rhodamine dye stain, and amido black." On October 2, 1991, the knives were returned to the Bloomington police department in sealed packages. At trial, the sealed packages that contained the knives were opened. Presumably after the trial, "all of the knives were placed without packaging together into a box."

¶ 11 Berry and Zeeb concluded the knives were subjected to outside influences once removed from their original packaging and the integrity of that evidence had been compromised. They recommended analysis of the original bloodstain evidence taken from the knives since the integrity of that evidence had not been violated.

¶ 12 Dr. Reich also submitted a report. He acknowledged "contamination by court personnel during or directly after [defendant's] trial" was "a possibility." However, Dr. Reich

believed the only way to determine whether contamination occurred and how probative testing results might be, was to perform DNA analysis on the knives. He stated as follows:

> "DNA STR analysis of a 'contaminated' sample could be indicated by a mixed profile. Given the size of the stains on the exhibits (large) and the amount of potential contamination by simple handling (small), it is most likely that 'contamination' of the sort discussed *** would be present as a minor component to a major profile upon DNA STR analysis."

¶ 13 Dr. Reich recommended first testing the knife exhibits for human blood using body fluid identification methods, Hema Trace and dual antibody sandwich ELISA testing, and then performing DNA STR analysis on only stains that tested positive for blood. He opined such a procedure could minimize the possibility of testing areas of the knives that were handled by personnel and which would have no probative connection to the case. Dr. Reich acknowledged information was unavailable "as to the reliability and sensitivity" of blood-testing methods "on biological samples that have been prepared for latent print examination and subsequently stored for 15 years." In their report, Berry and Zeeb noted the sandwich ELISA technology to which Dr. Reich referred had been shared with the FBI but had not yet been validated by the scientific community.

¶ 14 On July 28, 2005, following a further hearing with argument on the matter, the trial court entered an order on defendant's motion for DNA testing. It determined defendant met his burden in establishing a *prima facie* case for ordering DNA STR testing of the blood samples taken at the crime scene, hair samples, and blood samples taken from the five knives . However,

the court denied defendant's request for testing of the actual knives. It found defendant failed to meet the "chain of custody" requirement of section 116-3 with respect to the knives, stating it was possible they were inadvertently "'altered' in a 'material respect,' due to the way they were stored." The court also determined defendant failed to establish that the sandwich ELISA technology described and suggested by Dr. Reich was a testing method generally accepted within the relevant scientific community.

¶ 15 On August 26, 2005, defendant filed a motion to reconsider the trial court's order on his motion for DNA testing. He suggested error with several aspects of the court's decision, including its finding he failed to meet his burden with respect to the knives or the recommended sandwich ELISA technology. On October 25, and December 5, 2006, the court entered an order and amended order for DNA testing upon reconsideration. Neither decision altered the court's original decision with respect to testing of the knives.

¶ 16 On August 8, 2007, defendant filed a *pro se* motion to allow DNA testing to be performed by an independent testing facility. On October 5, 2007, defendant, with the assistance of counsel, filed a third amended motion to allow DNA testing. He alleged testing had been performed at the ISP Morton Crime Lab on 47 exhibits taken from the crime scene, including items not requested to be tested by defendant. Defendant asserted none of the items tested, other than representative samples from him, contained DNA profiles that matched his profile. Further, he alleged a "mixed sample" was found on a swab containing human blood taken from the blade of a knife used in the crime. One of the profiles from the "mixed sample" matched the victim "and the other matching an unidentified individual." Additionally, a DNA profile that matched neither the defendant nor the victim was found on a Cambridge cigarette paper.

¶ 17 Defendant requested he be allowed to independently examine and retest specific items of evidence. Also, he requested forensic testing of additional items of evidence, including beer cans, drinking glasses, a piece of cloth with a red stain, and a partial ceiling tile with apparent blood transfer. In connection with his third amended motion, defendant renewed his request for testing of the five knives found at the scene.

¶ 18 On July 1, 2009, the trial court entered an order on defendant's third amended motion to allow DNA testing. It denied his request for new or additional testing on items of evidence, including cigarette butts, beer cans, drinking glasses, and a partial ceiling tile. The court also denied defendant's request it reconsider its decision to deny testing on the knives.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant first argues the trial court erred by denying DNA testing of the knives found at the crime scene. He contends he presented a *prima facie* case the knives were subject to a chain of custody sufficient to establish they had not been altered in any *material* aspect.

¶ 22 Section 116-3 of the Code (725 ILCS 5/116-3 (West 2008)) allows a defendant to make a motion for forensic DNA testing "on evidence that was secured in relation to the trial which resulted in his or her conviction[.]" The defendant is required to present a *prima facie* case that identity was at issue at his trial and the evidence to be tested was subject to a proper chain of custody. 725 ILCS 5/116-3(b) (West 2008). The chain of custody must be sufficient to show the evidence "has not been substituted, tampered with, replaced, or altered in any material aspect." 725 ILCS 5/116-3(b)(2) (West 2008). Further, the trial court should allow a defendant's motion

where testing has the "potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence" even where testing results would not completely exonerate the defendant and "the testing requested employs a scientific method generally accepted within the relevant scientific community." 725 ILCS 5/116-3(c) (West 2008).

¶ 23 The trial court's decision with respect to a motion for DNA testing under section 116-3 is subject to *de novo* review. *People v. O'Connell*, 227 Ill. 2d 31, 35, 879 N.E.2d 315, 317-18 (2007). "Review in such cases is *de novo* because the trial court's decision regarding a section 116-3 motion is not based upon its assessment of the credibility of the witnesses but on its review of the pleadings and the trial transcripts." *People v. Moore*, 377 Ill. App. 3d 294, 298, 879 N.E.2d 434, 436-37 (2007). "Thus, the trial court is not in a better position than the reviewing court to judge the merits of the section 116-3 motion." *People v. Price*, 345 Ill. App. 3d 129, 133, 801 N.E.2d 1187, 1191 (2003).

¶ 24 The State argues a manifest-weight-of-the-evidence standard of review should apply in this case. We disagree. It notes the trial court conducted an evidentiary hearing and was presented with competing expert opinions. The record reflects that the court heard no live witness testimony and only reviewed reports submitted by the parties' experts. The court's decision in this case was based upon information contained in the documents before it. The court was in no better position than this court to judge the merits of defendant's 116-3 motion, and we apply a *de novo* standard of review.

¶ 25 "The purpose of the chain-of-custody requirement is to ensure the reliability of the evidence to be tested." *People v. Sanchez*, 363 Ill. App. 3d 470, 480, 842 N.E.2d 1246, 1254 (2006). Here, after bloodstains were removed from the knives, they underwent latent-print

examination. Analysis methods included "super glue fuming, black powder, ardrox, dye stain, rhodamine dye stain, and amido black." Although the ISP forensic laboratory returned the knives to their sealed packages following testing, the knives were removed from their packages during defendant's trial and apparently used for courtroom demonstration. They were then placed unsealed and without packaging in a box with other evidence from the case and stored in the circuit clerk's evidence vault. The number of individuals who had contact with the knives after they were unsealed or the exact nature of that contact is unknown.

¶ 26 The State's experts found the knives were subjected to outside influences the minute they were removed from their original packaging and recommended they not be re-analyzed due to the possibility of contamination. Dr. Reich, defendant's expert, agreed the possibility of contamination existed.

¶ 27 Section 116-3 requires the defendant to present a *prima facie* case that "the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect." 725 ILCS 5/116-3(b)(2) (West 2008). The record shows the knives were subjected to latent-print analysis and stored in a manner that subjected them to outside influences and contamination. Defendant acknowledges in his brief that his "strongest case for exoneration or a new trial rests in the possibility that some or all of the evidence requested to be tested shows a third party committed or was involved in the murder." Due to the manner in which the knives were handled and stored, it is possible the knives have been contaminated with the DNA of a person unrelated to the commission of the crime, but it is also possible a third person could be identified who committed the crime.

¶ 28 Defendant argues that analysis of "mixed DNA sample" is generally accepted in the scientific community and can reliably reveal the number of contributors to a sample as well as which of two contributors is the major versus minor contributor. Testing may not reveal a DNA profile originated from the time of the offense rather than as the result of later contamination. However, testing is the first step and defendant has proposed an approach to testing through Dr. Reich's testimony that minimizes the possibility of testing areas of the knives that were handled after the crime. It is correct defendant's contention that contamination would take the form of only a minor contribution in a "mixed sample" is speculative, but it is also speculative to conclude without testing that the knives have been so contaminated they will yield only unreliable results. The trial court erred by denying that portion of defendant's section 116-3 motion.

¶ 29 There are two key points regarding the specific context of this case to suggest testing may materially advance defendant's claim of innocence. While defendant presented an alibi defense at trial, he has never been permitted to advance his specific theory of the case–someone else murdered his father.

¶ 30 At trial, defendant made an offer of proof showing a specific, named person was at the scene of the crime just hours before the murder, was ejected from the tavern by the victim because of a drunken confrontation with two other customers, was a regular customer who knew the closing routine, and responded to a police visit just hours after the crime was discovered by making the following statement when asked if there had been trouble at the tavern: "I wouldn't hurt Bill Whalen. Bill Whalen is my buddy. What did I do?" This was at a time when only the authorities, a guilty party, or a witness would know Bill Whalen had been murdered. A jury would have been interested in this evidence.

¶ 31 Defendant also had an expert who would have challenged the reliability of the bloody palmprint in comparison. This was a key element of the State's case. Yet, defendant was not permitted to present that witness because of late disclosure.

¶ 32 On direct appeal, both this court and the supreme court rejected defendant's claims the trial court abused its discretion in excluding evidence of another person's involvement in the murder, and found defendant waived any challenge to the judge's ruling barring the expert's testimony where he refused to request a continuance. *People v. Whalen*, 158 Ill. 2d 415, 634 N.E.2d 604 (1992).

¶ 33 Those issues have been decided in the context of a trial, and a direct appeal, but in the context of a postconviction years later, when scientific tools are available, the history of the case informs our decision.

¶ 34 The trial court thoughtfully reviewed defendant's claims, carefully parsed his requests and granted some relief. Our review of the case and what has transpired since the night his father was killed prompts us to set aside concern with the efficiencies, such as they are, of the criminal justice system and the understandable concern for finality and permit the tests now available to be conducted. Science may not always yield an answer, but it is a tool that ought to be used. Only defendant's unyielding persistence brings us to a place and time where there may be an answer. He deserves the opportunity to seek and find the answer.

¶ 35 Defendant also challenges section 116-3 as unconstitutional. Because we conclude the trial court erred regarding the testing of the knives, we briefly address defendant's constitutional argument only as it applies to his claim he had the right to independent testing of *all* the items of evidence in his third amended motion for DNA testing at a facility of his choice.

Statutes are presumed to be constitutional and the burden of rebutting that presumption is on the challenging party. *People v. Williams*, 235 Ill. 2d 178, 199, 920 N.E.2d 446, 460 (2009). Further, "[s]tatutes must be read in a manner that makes them constitutional, when reasonable to do so." *People v. Ortiz*, 235 Ill. 2d 319, 332, 919 N.E.2d 941, 949 (2009). The constitutionality of a statute and whether an individual's constitutional rights have been violated is subject to *de novo* review. *Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393, 407, 917 N.E.2d 475, 483 (2009).

¶ 36 Defendant argues the trial court's refusal to grant him the right to independent DNA testing of all the evidence he requested violates his due-process and equal-protection rights and denies him his constitutional right to seek redress from the Governor of Illinois.

¶ 37 Defendant's argument he has constitutional rights to testing of all items of evidence at a lab of his own choosing is totally without merit. Section 116-3 provides a process for postconviction forensic testing. After a defendant has met certain requirements, "[t]he trial court shall allow the testing under reasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process ***." 725 ILCS 5/116-3(c) (West 2008). Section 116-3 does not afford a postconviction defendant to have an absolute and unfettered right to independent forensic testing. Nothing in the state or federal constitutions suggests such a right exists. Section 116-3's requirements as to postconviction DNA testing are more than sufficient to guarantee due process and equal protection.

¶ 38 In its July 2009 order, the trial court after rejecting defendant's argument he had a constitutional right to test *all* items of evidence at a lab of his own choosing, noted an agreement between defendant and the State "as to the testing at an independent lab of certain hair samples *** as well as two blood samples from knife swabs ***." The court also authorized payment to

the selected independent laboratory. Thus, defendant received some of the independent testing he requested.

¶ 39 Defendant had a meaningful opportunity to present his claims. Many of his requests for forensic DNA testing were granted and court did authorize payment to an independent lab for the testing of certain items of evidence. Defendant has not suffered any constitutional violations and his constitutional claims are without merit.

¶ 40 III. CONCLUSION

¶ 41 We reverse the trial court's judgment as to the testing of the knives and affirm in all other respects. As part of our judgment we grant the State its statutory assessment of $50 against defendant as costs of this appeal.

¶ 42 Affirmed in part and reversed in part.

¶ 43 JUSTICE McCULLOUGH, dissenting:

¶ 44 I respectfully dissent. The trial court's orders of July 28, 2005, and July 1, 2009, should be affirmed.

¶ 45 Neither section 116-3 nor the state and federal constitutions require a postconviction defendant to have an absolute and unfettered right to independent forensic testing.

¶ 46 Defendant had a meaningful opportunity to present his claims. Many of his requests for forensic DNA testing were granted and the court did authorize payment to an independent lab for the testing of certain items of evidence. Defendant has not suffered any constitutional violations and his claims are without merit.